Uniform Environmental Covenants Act

IC Roundtable
Tucson AZ
April 5, 2006

Introduction and Drafting Process.

- The Uniform Laws Conference-NCCUSL
 - Oldest stage governmental association in U.S.
 - *NOT* an interest group
 - Members, prior acts of interest (UCEA, UCC, Condo/UCIOA, etc.
- Joint Editorial Board on Real Property Acts
 - NCCUSL, ABA, and ACREL

Introduction and Drafting Process.

Genesis—Perceived Need for Long Term Certainty

• Timeline:

- Study and Drafting November 2000-August 2003
- ABA review and approval, Spring 2004
- Active legislative introduction began in 2005

The Process

- Drafting Committee
- Reporter
- Advisors--Stakeholders

Advisors—Stakeholders

- Regulators
 - State and Federal
- Property Owners
- PRP's
- Lenders
- "Green" Community
- Municipalities
- Title Insurance Companies
- Real Estate and Environmental Lawyers

Overview: Four main legal problems the Act resolves.

- 1. Creation of an Environmental Covenant
- 2. Legal Problems in making it valid and permanent
- 3. Changing the Covenant
- 4. Enforcing the Covenant

1. Creation of An Environmental Covenant:

- How clean must the land be?
 - Determined by a cleanup plan under existing environmental law, whether regulatory or supervised voluntary
 - UECA does *not* affect state cleanup standards or shift liability

1. Creation: What is required to have a Covenant? §4(a)

- Describe the land use restrictions and any affirmative requirements
- Agreement by the owner, the agency, and the holder
- Recording §8
 - Optional Statewide Registry system. §12

What else can you put in it? §4(b) suggests the following:

- Notice of change of ownership or land use
- Periodic reporting on the land use
- Access rights for various parties
- Description of the location and details of remaining contaminants, pathways of exposure, exposure limits
- Other rights or duties of the holder

2. Legal Problems in making it valid and permanent

- The Covenant runs with the land and is intended to be perpetual, until terminated under the Act. §5(a) and §9(a)
- The Act takes care of technical common law rules that would present problems §5(b)

2. Legal Problems (cont)

- State tax liens and foreclosures, adverse possession, and similar doctrines do not override the covenant §9(c)
- Marketable Title Act or Dormant Mineral Interests Acts §9(d)
- Real Property doctrines are dealt with (appurtenance, assignment, touch-and-concern, privity, negative burden, etc.)

2. Legal Problems (cont)

- Eminent domain and the "doctrine of changed circumstances" can override the covenant only in special situations. §§9(a)(5) and(b)
- Existing mortgages are not overridden by the Act: e.g. old lenders mortgages.
 - However, the agency will usually require mortgage owner to subordinate its interest.
 §3(d)(1) – more on this later

3. Changing the Covenant: These parties must consent:

- The Agency
- The current owner
- The holder
- Everyone who originally signed, unless a court determines they can't be found

3. Changing the Covenant (Cont)

- An amendment can affect an interest in the land only if the owner of that interest consents to it
- Special provisions on changing the holder and assigning to a new holder
- Regardless of this Act, the agency can reopen the underlying cleanup plan

4. Enforcing the Covenant §11: Who can enforce?

- The agency
- Any party to the Covenant, and any person expressly granted enforcement rights
- The local government where the land is located
- Any person whose interest or collateral in the property may be affected
- Any person whose liability may be affected.

4. Enforcing the Covenant (Cont)

- The Act provides a civil action for an injunction
- Agencies have additional enforcement rights
 - Under other environmental law
 - Under the cleanup remedy

Real Property Law -- Issues

- UECA is designed to avoid numerous issues under the law of real property that might, over time, impair or extinguish the right to enforce institutional controls.
- UECA does not attempt to ignore or overturn expected norms in real property law, but rather anticipates common (and not-so-common) problems and deals with them in a straightforward way.

Real Property Law – Issues (cont).

- UECA retains consistency with the practices and expectations of real estate law, and avoids uncertainty, by identifying the holder-grantee's right as an "interest in real property"
- Compare the CO statute, which provides that covenants
 - "run with the land and shall bind the owner of the land"
 - "may be created only by the owner of the property through a written grant to the department by a deed or other instrument of conveyance"
 - "shall be recorded as any other instrument affecting title to and interests in real property"
 - "all interests not transferred or conveyed in the environmental covenant shall remain in the grantor of the environmental covenant"

(C.R.S. 25-15-317 through 25-15-327)

Real Property Law – Issues (cont).

 Prior recorded interests. Some have taken the view that preexisting mortgages can be superseded without limit by regulatory fiat. Real property experts (and lenders) strongly disagree, and the consensus of the national drafting committee was that prior interests, in particular mortgages, need to be subordinated to UECA covenants.

Real Property Law – Issues (cont).

- Why require subordination?
 - Under the law of real property, foreclosure of a interest with priority extinguishes later recorded interests.
 - Ignoring prior interests may result in the later invalidation of a covenant, or worse, a takings claim
 - The existence of these legal questions is a problem because they create uncertainty until resolved. This uncertainty may keep cleanup from being done and covenants from being entered, delaying the ultimate resolution of the problem.
 - Respect for private property rights is fundamental to successful redevelopment

Implementation Issues (cont.)

- Long term enforcement
 - UECA takes the view that the more parties with continuing enforcement powers, the better.
 - PRPs, lenders, local governments, insurers, environmental groups, and others all have a strong self-interest in keeping needed controls in place.

Implementation Issues (cont.)

Redevelopment Issues

- UECA relies on existing real property law and practice, rather than a pure regulatory approach. This conforms to the expectations of lenders, title companies, and developers
- Without the ability to protect against future liability with respect to a later amendment or termination of a covenant), owners/PRPs may not take the risk of cleanup and redevelopment.
- Without recognition of lenders' rights, the effectiveness of controls may later be compromised, redevelopment is more difficult, and enactment becomes more difficult.

Implementation Issues (cont.)

- When are covenants "required"? Environmental agencies retain all existing regulatory authority under UECA, and can insist upon a covenant as a condition to cleanup approval or issuance of 'nofurther-action' letters. UECA does not create a statutory trigger.
- Citizen suits UECA is not intended to displace or interfere with existing citizen suit provisions. (local option)

UECA Enactments To Date

